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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

JEFF HATCH-MILLER, Chairman
WILLIAM A. MUNDELL
MARC SPITZER
MIKE GLEASON
KRISTIN K. MAYES

Arizona Corporation Commission

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IN THE MATTER OF THE APPLICATION OF
AERIE CONSERVANCY, AN ARIZONA
NONPROFIT CORPORATION, FOR
ADJUDICATION THAT IT IS NOT A PUBLIC
SERVICE CORPORATION.

DOCKET NO. W-04291A-04-0843

DECISION NO. 67881

OPINION AND ORDER

DATE OF HEARING:

March 23 and April 15, 2005

PLACE OF HEARING:

Phoenix, Arizona

ADMINISTRATIVE LAW JUDGE:

Teena Wolfe

APPEARANCES:

Jeffrey W. Crockett, SNELL & WILMER, on behalf of
applicant The Aerie Conservancy; and

David R. Ronald, Attorney, Legal Division, on behalf of
the Utilities Division of the Arizona Corporation
Commission.

BY THE COMMISSION:

On November 24, 2004, The Aerie Conservancy, a homeowners' association ("Association" or "Applicant") filed with the Arizona Corporation Commission ("Commission") an application for adjudication that it is not a public service corporation under Arizona law.

On December 7, 2004, the Commission's Utilities Division Staff ("Staff") filed a letter in this docket informing Applicant that its application is sufficient.

On December 13, 2004, a Procedural Order was issued setting this matter for hearing and setting associated procedural deadlines.

On February 8, 2005, Applicant filed an affidavit of publication indicating that notice of the application and hearing were published in the *Sedona Red Rock News*, a newspaper of general circulation in the requested adjudication area.

On February 15, 2005, Staff filed its Staff Report on the application, recommending conditional approval.

On March 16, 2005, Applicant filed its Response to Staff Report requesting modification to certain of Staff's recommended conditions on Commission approval of the application.

On March 21 and March 22, 2005, Applicant and Staff jointly contacted the Hearing Division requesting a continuance of the March 23, 2005 hearing date in order to discuss settlement of disputed issues.

On March 23, 2005, the hearing was convened as scheduled in order to provide the public with an opportunity to comment on the application. No members of the public appeared to provide public comment. The parties' request for a continuance was granted.

By Procedural Order issued March 23, 2005, the hearing was continued to April 15, 2005 and the timeclock for processing the application was suspended accordingly.

A hearing on the Application was held as scheduled on April 15, 2005 before a duly authorized Administrative Law Judge of the Commission. Applicant and Staff appeared through counsel. No members of the public were present to provide public comment. Following the filing of two late-filed exhibits that were admitted during the hearing, this matter was taken under advisement pending the submission of a Recommended Opinion and Order to the Commission.

* * * * *

Having considered the entire record herein and being fully advised in the premises, the Commission finds, concludes and orders that:

FINDINGS OF FACT

1. The Association is an Arizona nonprofit corporation formed for the purpose of representing future homeowners who will reside in a proposed 78 lot subdivision known as The Aerie, and to provide those homeowners with potable water service. The proposed subdivision is located approximately 1 mile south of Boyton Pass, west of the City of Sedona in Yavapai County, Arizona, and is fully described in Exhibit A, attached hereto and incorporated herein by reference.

2. The Association was incorporated in November of 2004, by Jay Pennypacker, a Vice

1 President of Communities Southwest Management, Inc., which is affiliated with Communities
2 Southwest Holdings, LLC ("Communities Southwest"),¹ a master planned community developer.
3 The current Association Board members are Jami Schulman, Jay Pennypacker, and John Suriano, all
4 officers of Communities Southwest.

5 3. Communities Southwest has established a separate affiliate, Red Rock Aerie, LLC
6 ("Red Rock Aerie"),² to develop The Aerie. The manager of Red Rock Aerie is Communities
7 Southwest Management, Inc. Red Rock Aerie's ownership of the property described in Exhibit A is
8 through a Dual Beneficiary Subdivision Trust.³ Applicant's witness testified that through the
9 subdivision trust agreement, Red Rock Aerie is granted all of the rights of a typical owner to entitle
10 and process and sell lots.

12 4. There are no sales contracts pending.

13 5. On November 24, 2004, the Association's Board of Directors, acting on behalf of its
14 future members, filed the above-captioned application requesting that the area described in Exhibit A
15 be adjudicated not a public service corporation under Arizona law.

17 6. On December 7, 2004, the Commission's Utilities Division Staff ("Staff") filed a
18 letter in this docket informing Applicant that its application is sufficient.

19 7. On December 13, 2004, a Procedural Order was issued setting this matter for hearing,
20 setting associated procedural deadlines, and requiring publication of notice of the application and
21 hearing in the requested adjudication area.

22 8. On February 8, 2005, Applicant filed an affidavit of publication indicating that notice
23 of the application and hearing were published in the *Sedona Red Rock News*, a newspaper of general
24 circulation in the requested adjudication area.

26
27 ¹ The directors of Communities Southwest are Denro Arizona, Inc., Demajeka, LLC and Athansor, Inc.

28 ² The members of Red Rock Aerie are Demajeka, LLC, Athansor, Inc. and Knight Industries, LP.

9. No motions to intervene were filed.

10. On February 17, 2005, Staff filed a Staff Report on the application recommending approval of the application subject to several conditions.

11. In the Staff Report, Staff reviewed the criteria set forth in Decision No. 55568 (May 7, 1987) in conjunction with the application and accompanying documentation and indicated that the Association had met five of the seven criteria. Specifically, Staff indicated that the Association had not demonstrated that it has complete ownership of the system and necessary assets; and had not demonstrated that the service area involved does not encompass a fixed territory. The Staff Report recommended approval of the Association's application for adjudication not a public service corporation subject to the Applicant's compliance with the following conditions by December 31, 2006, and that if Applicant failed to comply by that date, that the Decision granting the application be considered null and void without further Commission Order:

- (i) That Applicant file with Docket Control a strict prohibition for further expansion of the property to be served by the Association;
- (ii) That Applicant file with Docket Control documentation demonstrating ownership of the utility assets required to serve the Association;
- (iii) That Applicant file with Docket Control a copy of the Arizona Department of Environmental Quality Approval to Construct the proposed water system;
- (iv) That Applicant file with Docket Control a copy of the Arizona Department of Environmental Quality Approval of Construction of the proposed water system;
- (v) That Applicant file with Docket Control a copy of the Arizona Department of Water Resources' Letter of Adequate Water Supply for service to the Association;
- (vi) That Applicant file with Docket Control a copy of the final recorded plat; and

The first beneficiaries of the trust are Sedona Tree Farm Limited Liability Limited Partnership, Sedona Red Rock Land Limited Liability Limited Partnership, and Pegasus Numero Dos, LLC. Red Rock Aerie is the second beneficiary of the trust, and the trustee is First American Title Insurance Company.

1 (vii) That Applicant comply with requirements (i) through (vi) above prior to
2 obtaining a public report for marketing the property with water service to
the public.

3 12. On March 15, 2005, Applicant filed a Request for Approval for Extension of Time to
4 File Response to Staff Report, and on March 16, 2005, Applicant filed its Response to Staff Report.

5 13. Applicant's Response requested modification to certain of Staff's recommended
6 conditions on Commission approval of the application. Applicant stated in its Response that it has no
7 objection to the requirements in Staff's recommended conditions (i) through (vi), but requested a
8 modification to the compliance deadline for conditions (iv) and (vi). In addition, Applicant requested
9 that Staff's recommended condition (vii) be eliminated.
10

11 14. On March 21 and March 22, 2005, Applicant and Staff jointly contacted the Hearing
12 Division requesting a continuance of the March 23, 2005 hearing date in order to discuss settlement
13 of the disputed issues.

14 15. On March 23, 2005, the hearing was convened as scheduled in order to provide the
15 public with an opportunity to comment on the application at the publicly noticed time, date and
16 location. No members of the public appeared to provide public comment. The joint request for a
17 continuance was granted.
18

19 16. By Procedural Order issued March 23, 2005, the hearing was continued to April 15,
20 2005 and the timeclock for processing the application was suspended accordingly. The Procedural
21 Order directed that any stipulation reached by the parties be filed by April 13, 2005.
22

23 17. On April 13, 2005, Applicant and Staff jointly filed a Notice of Filing Joint
24 Stipulation, a copy of which is attached hereto as Exhibit B. The Joint Stipulation represents an
25 agreement between Applicant and Staff regarding Staff's recommendations as they appear in the
26 Staff Report.

27 18. Also on April 13, 2005, Applicant filed a Notice of Filing Metes and Bounds Legal
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Description.

19. The hearing on the application was reconvened as scheduled on April 15, 2005 before a duly authorized Administrative Law Judge of the Commission. Applicant and Staff appeared through counsel and presented evidence. Witnesses for both Applicant and Staff testified in support of the Joint Stipulation. No members of the public were present to provide public comment.

20. Applicant's witness testified that the development is located in the Red Rocks, and that the developer is attempting to keep it as much as possible in its natural state. She stated that road construction into the development will not begin until easements are granted and the public report for the development is secured. Legal access to the development will be provided through Boynton Pass and other Forest Service roads, and easements for the roads leading into the property and the road connecting parcels 1-41 with parcels 42-78 will ultimately be granted to the Association.

21. Applicant's witness testified that Communities Southwest does not expect build-out of The Aerie to occur for many years, and that the lots and the homes that will be built on them will be of a very high-end nature. The water storage and supply system is designed to provide fireflow capacity, at 500 gallons per minute for four hours, which is approximately double the requirement imposed by the Fire Marshal. Fire hydrants will be installed at locations approved by the Fire Marshal, and the developer is requiring that each home constructed on the property have a sprinkler system. The developer will pay for the cost of the water infrastructure and will convey the infrastructure to the Association via a bill of sale. Wastewater treatment will be provided by individual microseptic systems installed by each homeowner.

22. Staff's witness testified that based on the application and evidence presented at the hearing, Staff believes that the Association's application meets the Commission's criteria for being adjudicated not a public service corporation and recommends that the Commission grant the application subject to its recommended conditions as modified by the Joint Stipulation.

23. At the hearing, Applicant was directed to file in this docket, as late-filed exhibits, Exhibits A-9 and A-10. On April 28, 2005, Applicant filed a Notice of Filing Late-Filed Exhibits A-9 and A-10. Exhibit A-9 is a copy of Aerie's draft bylaws, and Exhibit A-10 is a revised copy of Section 2.22 of its draft Declaration of Covenants, Conditions, Restrictions and Easements for The Aerie ("CC&Rs").

24. In Commission Decision No. 55568 (May 7, 1987), the Commission issued a policy directive regarding applications for adjudication not a public service corporation, and provided the following criteria for evaluation of such applications:

- (i) the application must be submitted by a non-profit homeowners association;
- (ii) the application is a bona fide request by a majority of the membership of the association through a petition signed by 51 percent or more of the then-existing members;
- (iii) that all such associations making an application have complete ownership of the system and the necessary assets;
- (iv) that every customer is a member/owner with equal voting rights and that each member is or will be a customer;
- (v) that the service area involved encompasses a fixed territory which is not within the service area of a municipal utility or public service corporation, or if it is, that the municipal utility or public service corporation is unable to serve;
- (vi) that there is a prohibition against further sub-division evidenced by deed restrictions, zoning, water restrictions, or other enforceable governmental regulations; and
- (vii) that the membership is restricted to a fixed number of customers, actual or potential.

25. The draft CC&Rs attached to the application demonstrated that the developer, Red Rock Aerie, will not have the right to cast Association votes with respect to water system matters. However, the draft CC&Rs, which allowed one vote per lot owned, instead of one vote per member, did not clearly provide equal voting rights for all members consistent with Commission policy.

1 Applicant's witness testified at the hearing that it intends that the CC&Rs reflect that all Association
2 members have equal voting rights. Following the hearing, on April 28, 2005, the Association
3 provided, as a late-filed evidentiary exhibit, a revised Section 2.22 of its draft CC&Rs. The revised
4 Section 2.22 of the draft CC&Rs provides that every "Water Customer" shall be entitled to cast one
5 vote for each lot owned, and defines "Water Customer" as a lot owner or owner of a common area on
6 which there are improvements that are connected to the water system and which are capable of
7 receiving water service via the water system.
8

9 26. Applicant also provided a copy of its bylaws, which provides that Association voting
10 rights are defined by the CC&Rs.

11 27. Applicant avowed in its Notice of Filing Late-Filed Exhibits A-9 and A-10 that it had
12 provided a copy of the revised CC&R section on voting rights to Staff, and that Staff was satisfied
13 with the draft CC&R revision.

14 28. Aerie meets the criteria for evaluation of applications for adjudication not a public
15 service corporation provided by the policy directive issued in Decision No. 55568 in the following
16 manner
17

18 (i) The Association is a nonprofit corporation formed by the property owner in the
19 requested adjudication area to provide water for its future members, who will own the land in the
20 requested area.

21 (ii) A majority of the existing membership of the Association has approved the
22 application. The three members of the Association's Board of Directors adopted a resolution
23 approving the application.
24

25 (iii) The Association will have complete ownership of the system and necessary
26 assets. Pursuant to the Joint Stipulation, the Association will file with Docket Control documentation
27 demonstrating its ownership of the well, the 120,000 gallon storage tank and booster pump
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1 comprising the backbone structure for The Aerie, and the distribution infrastructure for lots 1-41 of
2 The Aerie within 24 months of this Decision, and will file with Docket Control documentation
3 demonstrating its ownership of the distribution infrastructure for lots 42-78 of The Aerie within 30
4 days of the date ownership of such infrastructure is transferred to the Association.

5 (iv) Under the Association's amended draft bylaws and CC&Rs, every customer of
6 the Association will be a member with equal voting rights with respect to Water System Matters as
7 defined in its amended draft CC&Rs, and every member is or will be a customer. Red Rock Aerie
8 does not have the right to cast votes with respect to Water System Matters, regardless of the number
9 of lots actually owned unless it becomes a Water Customer as defined in its amended draft CC&Rs.

10 (v) The Association's service area encompasses a fixed area that is not within the
11 service area of a municipal utility or public service corporation. The requested adjudication area
12 described in Exhibit A is not located within a municipal boundary or adjacent to an existing water
13 utility. The requested adjudication area is approximately 177 acres in size and has no room to
14 expand, as it borders the Coconino National Forest. Pursuant to the Joint Stipulation, within 24
15 months of this Decision, the Association will file with Docket Control a strict prohibition for further
16 expansion of the property to be served by the Association. We will require that the stipulated filing
17 consist of provisions in the Association's bylaws and CC&Rs that limit water service to the parcel
18 owners within the requested adjudication area, which will not exceed 78 lots.

19 (vi) The Association's CC&Rs will prohibit further subdivision of the parcels in
20 the service area.

21 (vii) The Association's CC&Rs will restrict membership to a fixed number of
22 potential customers. Total allowable membership is limited to 78. Membership in the Association
23 will be appurtenant to the parcel and limited to landowners in the subject area.

24 29. Despite the fact that the restriction to a fixed number of memberships, the prohibition

1 against further subdivision, and equal voting rights requirements are evidenced by deed restrictions in
2 the draft CC&Rs, the draft CC&Rs additionally provide that the CC&Rs may be amended by two-
3 thirds of the Association's members, excluding Red Rock Aerie. The Association's draft Bylaws
4 additionally provide that until the "Transition Date," defined in the CC&Rs as 90 days following the
5 date on which Red Rock Aerie no longer owns fee title or beneficial title to any portion of the
6 requested adjudication property or such earlier date that Red Rock Aerie voluntarily records an
7 instrument stating that the Transition Date has occurred, that Red Rock Aerie may unilaterally amend
8 its Bylaws for any reason. Consequently, we will require that if the Association's CC&Rs or Bylaws
9 are ever changed to allow further subdivision of the current 78 lots, to allow an increased number of
10 memberships, to allow expansion of the property to be served by the Association, or to change the
11 equal voting rights requirements, the adjudication granted by this Order shall become null and void
12 without further Commission Order. In that event, we will require that the Association file an
13 application for a Certificate of Convenience and Necessity within thirty days.

14 30. According to the Applicant's testimony, the Association's system will consist of a
15 well, a 120,000 gallon storage tank and booster pump, and the distribution infrastructure for lots 1-78.
16 Pursuant to the Joint Stipulation, Applicant has agreed to file a copy of its Arizona Department of
17 Environmental Quality ("ADEQ") Approval of Construction for the well, storage tank, booster pump,
18 and distribution infrastructure for lots 1-41 within 24 months of this Decision, and will timely request
19 from ADEQ and file with Docket Control a copy of its ADEQ Approval of Construction for the
20 distribution infrastructure for lots 42-78 of The Aerie upon receipt from ADEQ.

21 31. Due to the fact that the Association will have more than fifteen connections, it is
22 subject to ADEQ monitoring requirements.

23 CONCLUSIONS OF LAW

24 1. The Commission has jurisdiction over the subject matter of the application.

25 2. Upon compliance with the Commission's requirements as set forth herein, the
26 Association is not a public service corporation within the meaning of Article XV of the Arizona
27 Constitution.

28 3. The Association remains subject to applicable laws, regulations and orders of other

1 regulatory agencies, including but not limited to ADEQ and Yavapai County.

2 4. Notice of the application was provided in accordance with law.

3 5. Staff's recommendations as modified by the Joint Stipulation attached hereto as
4 Exhibit B are reasonable and should be adopted, along with the provisions set forth in Findings of
5 Fact No. 29 above.

6 **ORDER**

7 IT IS THEREFORE ORDERED that the application of The Aerie Conservancy for
8 adjudication not a public service corporation is hereby granted, conditioned upon The Aerie
9 Conservancy's compliance with the seven following ordering paragraphs.
10

11 IT IS FURTHER ORDERED that within 24 months of this Decision, The Aerie Conservancy
12 shall file with Docket Control a copy of the Declaration of Covenants, Conditions, Restrictions and
13 Easements for The Aerie as filed with the Yavapai County Recorder that includes a limitation on the
14 provision of water service to the owners of the 78 lots located within the requested adjudication area,
15 in addition to the same substantive provisions in the draft Declaration of Covenants, Conditions,
16 Restrictions and Easements discussed herein, as revised by the late-filed hearing Exhibit A-10.
17

18 IT IS FURTHER ORDERED that within 24 months of this Decision, The Aerie Conservancy
19 shall file with Docket Control a copy of the Arizona Department of Environmental Quality Approval
20 to Construct the water system as proposed in the application.

21 IT IS FURTHER ORDERED that within 24 months of this Decision, The Aerie Conservancy
22 shall file with Docket Control a copy of the Arizona Department of Water Resources' Letter of
23 Adequate Water Supply for service to The Aerie.
24

25 IT IS FURTHER ORDERED that within 24 months of this Decision, The Aerie Conservancy
26 shall file with Docket Control documentation demonstrating its ownership of, and a copy of the
27 Arizona Department of Environmental Quality Approval of Construction for: (i) the well, 120,000
28 gallon storage tank and booster pump comprising the backbone infrastructure for The Aerie; and (ii)

1 the distribution infrastructure for lots 1-41 of The Aerie.

2 IT IS FURTHER ORDERED that within 24 months of this Decision, The Aerie Conservancy
3 shall file with Docket Control a copy of the final recorded plat for lots 1-41 of The Aerie.

4 IT IS FURTHER ORDERED that within 24 months of this Decision, The Aerie Conservancy
5 shall file with Docket Control a written commitment from Red Rock Aerie, LLC that it will obtain
6 one or more public reports for The Aerie consistent with the requirements of Arizona law and the
7 Arizona Department of Real Estate, including requirements that Red Rock Aerie, LLC provide
8 financial assurances for the costs of constructing the backbone water infrastructure and distribution
9 lines within The Aerie.
10

11 IT IS FURTHER ORDERED that each June 1, until the "Transition Date" as defined in the
12 draft Declaration of Covenants, Conditions, Restrictions and Easements for The Aerie attached to the
13 application, The Aerie Conservancy shall file with the Commission an annual certification signed by
14 an officer that the Declaration of Covenants, Conditions, Restrictions and Easements restricting
15 further subdivision of the current 78 lots in the requested adjudication area, limiting the number of
16 memberships in The Aerie Conservancy, prohibiting expansion of the property to be served by The
17 Aerie Conservancy, and granting equal voting rights remain in place and have not been altered,
18 amended or repealed.
19

20 IT IS FURTHER ORDERED that if the bylaws of The Aerie Conservancy are ever changed
21 to allow further subdivision of the current 78 parcels in the requested adjudication area, to allow an
22 increased number of memberships, to allow expansion of the property to be served, or to change the
23 equal voting rights requirements, that the adjudication granted herein shall immediately become null
24 and void without further Commission Order, and The Aerie Conservancy shall file an application for
25 a Certificate of Convenience and Necessity within thirty days.
26

27 IT IS FURTHER ORDERED that The Aerie Conservancy shall file with Docket Control
28

1 documentation demonstrating its ownership of the distribution infrastructure for lots 42-78 of The
2 Aerie within 30 days of the date ownership of such infrastructure is transferred to The Aerie
3 Conservancy.

4 IT IS FURTHER ORDERED that The Aerie Conservancy shall timely request an Approval of
5 Construction for the distribution infrastructure for lots 42-78 of The Aerie from the Arizona
6 Department of Environmental Quality, and shall file with Docket Control a copy of the Approval of
7 Construction upon receipt.
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9 IT IS FURTHER ORDERED that The Aerie Conservancy shall file with Docket Control a
10 copy of the final recorded plat for lots 42-78 of The Aerie within 30 days of the date the plat is
11 recorded with Yavapai County.
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IT IS FURTHER ORDERED that The Aerie Conservancy is hereby advised of its continuing obligations under the applicable laws, regulations and orders of other regulatory agencies, including but not limited to the Arizona Department of Environmental Quality and Yavapai County.

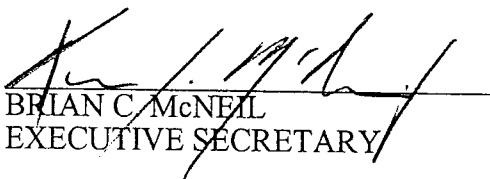
IT IS FURTHER ORDERED that this Decision shall become effective immediately.

BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

  
CHAIRMAN COMMISSIONER COMMISSIONER

 
COMMISSIONER COMMISSIONER

IN WITNESS WHEREOF, I, BRIAN C. McNEIL, Executive Secretary of the Arizona Corporation Commission, have hereunto set my hand and caused the official seal of the Commission to be affixed at the Capitol, in the City of Phoenix, this 1st day of June, 2005.


BRIAN C. McNEIL
EXECUTIVE SECRETARY

DISSENT _____

DISSENT _____

TW:mj

1 SERVICE LIST FOR: AERIE CONSERVANCY

2 DOCKET NO.: W-04291A-04-0843

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LEGAL DESCRIPTION FOR THE AERIE

Homestead Entry Survey No. 626 located within a portion of Section 5, Township 17 North, Range 5 East of the Gila and Salt River Base and Meridian, Yavapai County, Arizona, more particularly described as follows:

Commencing at a BLM brass cap monument marking the West Quarter corner of Section 5, from which the Southwest corner of Section 5 bears S 00°13'52" E 2646.81 feet;

Thence S 86°56'06" E 748.75 feet, to a BLM brass cap monument marking the point of beginning;

Thence N 00°08'23" W 1648.07 feet, to a chiseled "X" in stone inscribed "HES 626";

Thence N 65°41'54" E 460.76 feet, to a chiseled "X" in stone inscribed "HES 626";

Thence S 36°18'45" E 1349.51 feet, to a BLM brass cap monument;

Thence S 00°19'54" W 404.18 feet, to a BLM brass cap monument;

Thence S 39°55'11" E 355.66 feet, to a BLM brass cap monument;

Thence S 64°21'01" E 1506.72 feet, to a BLM brass cap monument;

Thence S 54°40'29" W 1621.72 feet, to a BLM brass cap monument;

Thence N 79°50'35" W 670.37 feet, to a BLM brass cap monument;

Thence N 30°16'16" W 1619.17 feet, to the point of beginning.

Containing 100.656 acres, more or less.

Together with a parcel of land located in the Northeast Quarter of Section 8, Township 17 North, Range 5 East, of the Gila and Salt River Base and Meridian, Yavapai County, Arizona, more particularly described as follows:

Commencing at a BLM brass cap monument marking the East Quarter Corner of Section 8;

Thence S 89°19'32" W 984.79 feet, along the South line of said Northeast Quarter, to the point of beginning;

Thence continuing S 89°19'32" W 984.79 feet to a point;

Thence N 01°38'12" W 329.27 feet, to a point;

Thence S 89°23'22" W 656.93 feet, to a point on the West line of said Northeast Quarter;

Thence N 01°42'16" W 1319.97 feet, along said West line, to a point;

Thence N 89°38'37" E 658.55 feet, to a point;

Thence N 01°38'12" W 658.51 feet, to a point;

Thence N 89°46'13" E 329.68 feet, to a point;

Thence S 01°36'11" E 328.89 feet, to a point;

Thence N 89°42'25" E 988.43 feet, to a point;

Thence S 01°30'01" E 1311.13 feet, to a point;

Thence S 89°27'11" W 328.67 feet, to a point;

Thence S 01°32'04" E 656.31 feet, to the point of beginning.

Containing 76.964 acres, more or less.

*IN THE MATTER OF THE APPLICATION OF THE AERIE
CONSERVANCY, AN ARIZONA NONPROFIT CORPORATION, FOR AN
ADJUDICATION THAT IT IS NOT A PUBLIC SERVICE CORPORATION*

DOCKET NO. W-04291A-04-0843

JOINT STIPULATION

The Aerie Conservancy, an Arizona nonprofit corporation ("Association"), and the Arizona Corporation Commission Utilities Division Staff ("Staff") (collectively referred to as the "Parties") hereby execute this Joint Stipulation.

Background:

On February 17, 2005, Staff filed its Staff Report in this docket recommending approval of the Association's Application for Adjudication Not a Public Service Corporation ("Application"), subject to seven recommendations (collectively, the "Recommendations"). The Association does not oppose the substance of the Recommendations. However, the Association advised Staff that the compliance deadlines contained in the Staff Report cannot be achieved by the Association for several of the Recommendations or parts thereof, and that it is not feasible for the Association to comply with Recommendations 1-6 prior to obtaining a public report, as required in Recommendation 7. Staff and the Association met to discuss modifications to the compliance deadlines and Recommendation 7, and the Parties reached agreement on modifications to the Recommendations as set forth in this Joint Stipulation.

According to the Association, the compliance deadlines in the Staff Report pose problems for the Association because there is uncertainty regarding the actual start date for construction of the Aerie development. The Aerie development, located in Yavapai County, is entirely surrounded by the Coconino National Forest. Therefore, the developer must obtain an easement from the United States Forest Service, in a form acceptable to the Forest Service and Yavapai County, allowing public access to the development. Although the easement is forthcoming, the timing of issuance is beyond the developer's control. In addition, the build-out of the Aerie development will proceed at a slower pace, relative to many other developments, due to the upscale nature of the development. As a result, the Association notified Staff that it cannot comply with the December 31, 2006, compliance deadline associated with the Recommendations contained in the Staff Report or with the requirement that the Association comply with Recommendations 1-6 prior to obtaining a public report. The Parties met to discuss a solution to the issues raised by the Association, and have agreed to the modifications of the Recommendations contained in the Staff Report as set forth below.

Stipulation:

The Parties agree to the following modifications to the Recommendations.

1. With regard to Recommendations 1, 3 and 5, the Association will fully comply with each recommendation within twenty-four (24) months of the date the Arizona Corporation Commission issues a decision approving the Association's application for adjudication not a public service corporation, and will file documentation demonstrating such compliance with Docket Control within the same time period.

2. With regard to Recommendation 2, the Association will file with Docket Control documentation demonstrating its ownership of (i) the well, 120,000 gallon storage tank and booster pump comprising the backbone infrastructure for the Aerie development; and (ii) the distribution infrastructure for lots 1-41 of the Aerie development within twenty-four (24) months of the date the Commission issues a decision in this docket. The Association will file with Docket Control documentation demonstrating its ownership of the distribution infrastructure for lots 42-78 of the Aerie development within thirty (30) days of the date ownership of such infrastructure is transferred to the Association.

3. With regard to Recommendation 4, the Association will file with Docket Control a copy of its Approval of Construction, issued by the Arizona Department of Environmental Quality, for the (i) the well, 120,000 gallon storage tank and booster pump comprising the backbone infrastructure for the Aerie development; and (ii) the distribution infrastructure for lots 1-41 of the Aerie development within twenty-four (24) months of the date the Commission issues a decision in this docket. The Association will timely apply for an Approval of Construction for lots 42-78 of the Aerie development once construction of water distribution lines for those lots is completed, and will file a copy of such approval with Docket Control upon receipt. Although the developer of the Aerie development previously filed for an Approval to Construct from ADEQ for the whole of the Aerie development, the developer will bifurcate the application and re-file separate applications with ADEQ for lots 1-41 and lots 42-78.

4. With regard to Recommendation 6, the Association will file with Docket Control a copy of the final recorded plat for lots 1-41 within twenty-four (24) months of the date the Commission issues a decision in this docket. The Association will file a copy of the final recorded plat for lots 42-78 within thirty (30) days of the date the plat is recorded with Yavapai County.

5. With regard to Recommendation 7, the Association will file with Docket Control a written commitment from the developer of the Aerie development that the developer will obtain one or more public reports for the Aerie development consistent with the requirements of Arizona law and the Arizona Department of Real Estate, including requirements that the developer provide financial assurances for the costs of constructing the backbone water infrastructure and distribution lines within the development.

The Parties agree that the modifications to the compliance deadlines as set forth in this Joint Stipulation do not alter substantively the intent behind the Staff Recommendations, which the Parties agree are necessary and appropriate to protect the public interest.

